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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

20 Lenovo (United States) Inc. and Motorola
21 Mobility, LLC,

22 Plaintiffs,

23 v.

24 IPCom GmbH & Co. KG,

25 Defendant.

Case No. 5:19-cv-01389-EJD

**IPCOM'S MOTION TO DISMISS
AMENDED COMPLAINT**

Hearing Date: May 26, 2022
Time: 9:00 am
Place: Courtroom 4, 5th Floor
Judge: The Honorable Edward J. Davila

Complaint Filed: March 14, 2019
Trial Date: TBD

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT at 9:00 a.m. on May 26, 2022, or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Edward J. Davila, located at 280 South 1st Street, Courtroom 4, 5th Floor, San Jose, CA 95113, Defendant IPCCom GmbH Co. KG will and hereby does move this Court to dismiss Plaintiffs Lenovo (United States) Inc. and Motorola Mobility, LLC's (collectively, "Lenovo U.S." or "Plaintiffs") Amended Complaint (ECF No. 158) pursuant to Federal Rule of Civil Procedure 12(b)(2), and 12(b)(6) for failure to state a claim, lack of personal jurisdiction, and lack of subject matter jurisdiction.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying exhibits in support thereof, the records in this action and such further evidence and argument that may be presented at the hearing of this motion and that the Court may consider.

ISSUES TO BE DECIDED

1. Whether all counts (Counts I, II, III, IV, and V) of Plaintiffs' Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2) because this Court cannot lawfully exercise personal jurisdiction over IPCOM.

2. Whether Lenovo U.S.'s antitrust claim (Count III) should be dismissed for failure to state a claim for relief under Rule 12(b)(6) because IPCom's alleged conduct cannot, as a matter of law, give rise to antitrust liability under Section 2 of the Sherman Act pursuant to the Ninth Circuit's *Qualcomm* decision;

3. Even if Lenovo can bring an antitrust cause of action under the Third Circuit's *Broadcom* decision, whether Lenovo U.S.'s antitrust claim should be dismissed for failure to adequately plead conduct antitrust injury or a plausible product market; and

4. Whether Lenovo U.S.'s claims for declaratory judgment of patent non-infringement (Counts IV and V) should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) given the absence of a case or controversy between the parties.

1 5. Whether the Court should decline to exercise its discretionary powers under the
2 Declaratory Judgment Act to hear Lenovo U.S.'s claims for declaratory judgment for FRAND
3 claims (Count II) and declaratory judgment of non-infringement (Counts IV and V).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 This is a foreign dispute between two foreign companies having no relationship to this
4 District. The real parties to this dispute are Lenovo Group Ltd. (“Lenovo China”) (a Chinese
5 company) and IPCOM GmbH & Co. KG (“IPCOM”) (a German company), who were involved in
6 sporadic negotiations over a worldwide license to IPCOM’s global patent portfolio. After these
7 negotiations broke down, Lenovo China attempted to use its United States subsidiaries—Lenovo
8 (United States) Inc. (“Lenovo U.S.”) and Motorola Mobility, LLC’s (“Motorola”) (collectively
9 “Plaintiffs”—to manufacture jurisdiction and controversy in this District and the United States
10 where there is none. This Court saw through this tactic in its earlier order of December 12, 2019
11 (the “Order”), holding that Plaintiffs had failed to make a *prima facie* showing of personal
12 jurisdiction.

13 After the substantial completion of jurisdictional discovery and the issuance of new Ninth
14 Circuit antitrust precedent, Lenovo filed an Amended Complaint, but this too fails to allege
15 sufficient connections to the Northern District of California to support jurisdiction over IPCom.
16 In addition, the Amended Complaint makes no effort to improve on Plaintiffs' antitrust cause of
17 action under § 2 of the Sherman Act.

18 || The Court should dismiss this action for multiple reasons:

19 *First*, the Amended Complaint raises nothing new or of relevance to the jurisdictional
20 question. There is certainly no basis for the Court to reverse its prior decision on jurisdiction.
21 With respect to the patent declaratory judgment claims, the only allegations in the Amended
22 Complaint that bear any connection to this District are: (1) IPCom’s handful of in-person
23 meetings with Motorola in San Francisco in 2012-2014, (2) the retention of an agent, Roger Ross,
24 who kept his home in this District, and (3) meetings and licensing activities with third parties
25 Apple and Microsoft in this District, including the filing of a 28 U.S.C. § 1782 application
26 seeking discovery from Apple for use in foreign proceedings. Plaintiffs had a full and fair
27 opportunity to brief the relevance of the Motorola meetings, so there is nothing new here. As the
28 Court previously recognized, IPCom’s retention of Roger Ross was not for the purpose of

1 targeting licensees located in this forum and thus cannot confer jurisdiction over IPCom. And the
 2 meetings with Apple in California are hardly sufficient to confer specific jurisdiction over IPCom
 3 for the matters pleaded here. Lenovo's Amended Complaint fails to allege sufficient new
 4 allegations to support personal jurisdiction over IPCom.

5 **Second**, the Court should decline to exercise jurisdiction over the declaratory judgment
 6 claim under its inherent authority to decline declaratory relief under 28 U.S.C. § 2201(a). There
 7 is no live controversy between the parties over the '844 and '144 patents, and certainly none
 8 arising out negotiations between IPCom and Motorola that concluded in 2014. The patents have
 9 now expired in any case, and there is nothing worth devoting precious judicial resources to in the
 10 Amended Complaint.

11 **Third**, Lenovo has failed to sufficiently plead a claim for monopolization under the
 12 Sherman Act. At most, Lenovo U.S. asserts that IPCom breached a contractual obligation to
 13 license standard essential patents ("SEPs") on fair, reasonable, and non-discriminatory
 14 ("FRAND") terms, but the Ninth Circuit has recently clarified that such conduct does not give
 15 rise to an antitrust claim. *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 982 (9th Cir.
 16 2020). Lenovo U.S. has argued that there is an exception for antitrust claims based on the
 17 intentional deception of a standard setting organization ("SSO"), relying on the Third Circuit's
 18 earlier *Broadcom* decision. But even if such a "*Broadcom* exception" survived *Qualcomm*, it
 19 does not apply in this case because Lenovo U.S. has failed to plead facts demonstrating
 20 intentional deception. Likewise, Lenovo has failed to plead antitrust injury or a plausible product
 21 market, which provide independent grounds to dismiss its antitrust claim.

22 **II. PROCEDURAL AND FACTUAL BACKGROUND**

23 **A. The Parties and Prior Negotiations**

24 IPCom is a small intellectual property consulting, R&D, and licensing company organized
 25 and existing under the laws of Germany, with six employees and its principal place of business in
 26 Pullach, Germany. *See* Dkt. 17-4 (Declaration of Pio Suh) (hereinafter "Suh Decl."), ¶¶ 2-4.
 27 Between January 2014 and March 2019, IPCom engaged in negotiations with Lenovo China—the
 28 Plaintiffs' parent company headquartered in Hong Kong—over a license to IPCom's global

1 patent portfolio. Am. Compl., ¶ 56-99. There were numerous contacts and meetings in China
 2 and a single meeting in Chicago at the request of Lenovo China. Ex. A, 103:18:104:2; Suh Decl.,
 3 ¶ 16. There were no meetings between Lenovo China or Lenovo U.S. and IPCom in this District.

4 In the midst of litigation in Europe, Lenovo China instructed its subsidiaries Lenovo U.S.
 5 and Motorola to file the instant action, seeking a declaratory judgment of non-infringement and/or
 6 invalidity with respect to U.S. Patent Nos. 6,307,844 and 6,920,124 (the “‘844 and ‘144 patents”).
 7 IPCom has never filed suit for infringement of these patents, even though the patents have now
 8 expired. Suh Decl., ¶¶ 17-18. The only link Lenovo U.S. alleges with respect to its claim for
 9 specific jurisdiction in this District is that Roger Ross, a consultant of IPCom who attended the
 10 Chicago meeting, resided in this District. Ex. A, 103:18:104:2

11 IPCom also engaged in negotiations with Motorola between 2009 and 2014. At the time,
 12 Motorola was headquartered in Chicago, Illinois and unaffiliated with Lenovo U.S. These
 13 negotiations included several meetings in San Francisco, but ended in 2014. Amended Compl.,
 14 ¶¶ 32, 33, 40, 42, 45, 53. IPCom did not have any further contact with Motorola except when
 15 directed to do so by Lenovo China after Motorola’s acquisition in October 30, 2014. Motorola
 16 then ceased to exist as an independent entity. All facts relating to these meetings were known to
 17 Plaintiffs in the prior around of briefing.

18 IPCom also engaged in licensing discussions with third parties, some of whom were
 19 located in this District. There are no allegations in the Amended Complaint that the Plaintiffs
 20 participated in those meetings or were harmed in any way by the discussions.

21 **B. Procedural Background and the Court’s December 12, 2019 Order**

22 Plaintiffs filed the original Complaint on March 14, 2019, alleging breach of contract,
 23 declaratory judgment, antitrust monopolization, and declaratory judgment of noninfringement of
 24 the ‘844 and ‘144 patents. On July 2, 2019, IPCom moved to dismiss, arguing that the Court
 25 lacked personal jurisdiction over it. Dkt. No. 18.

26 After being sued here, IPCom initiated patent infringement proceedings in the U.K.
 27 against Lenovo China’s U.K. affiliates. Lenovo U.S. filed a motion for anti-suit injunction,
 28 seeking to prevent IPCCom from further pursuing the U.K. litigation and to prevent IPCCom from

1 initiating further patent infringement actions abroad against any Lenovo China affiliate. Dkt. No.
 2 40. However, during the pendency of this motion, a French Court ordered Plaintiffs to withdraw
 3 the anti-suit injunction motion as it relates to any legal proceedings initiated by IPCOM before the
 4 French Courts, imposing severe financial penalties if Plaintiffs failed to do so. Dkt. No. 58.

5 On December 12, 2019, this Court held that Plaintiffs failed to establish a *prima facie* case
 6 of personal jurisdiction with respect to both its antitrust and declaratory judgment claims and
 7 ordered the parties to conduct jurisdictional discovery. The Order also terminated Plaintiffs'
 8 motion for anti-suit injunction.

9 With respect to Lenovo's claims for declaratory judgment of non-infringement, the Court
 10 held that IPCOM's licensing communications with Lenovo failed to satisfy the requirement of
 11 minimum contacts with the forum because IPCOM directed its negotiations towards Lenovo
 12 China, and "[c]ommunicating with Lenovo China's counsel in the United States is not a
 13 purposeful or directed contact with the United States." The Court further held that the
 14 negotiations were not specific to the '844 and '124 Patents. Dkt. No. 71, at 17-19. In addition,
 15 the Order further stated that "[e]ven if IPCOM had negotiated with Lenovo US could establish
 16 minimum contacts with the forum, such communications, without more, would not satisfy the
 17 fairness prong of the due process inquiry." *Id.*, at 19.

18 With respect to Lenovo's antitrust claim, this Court found that two acts Lenovo alleged—
 19 (1) IPCOM's alleged false declarations to ETSI and 3GPP that it would license its SEPs on
 20 FRAND terms, and (2) IPCOM's alleged demand for supra-competitive royalties from Lenovo
 21 China—were insufficient to confer jurisdiction because the allegedly false declarations were not
 22 expressly aimed at the United States.

23 **C. Jurisdictional Discovery, IPCOM's Second Motion to Dismiss, and Plaintiffs'
 24 Amended Complaint**

25 After issuance of the Court's December 12, 2019 order, Lenovo aggressively pursued
 26 discovery and served overbroad and overreaching discovery requests. *See* Dkt. 80 (J. DeMarchi's
 27 February 14, 2020, Discovery Order) (noting that "Lenovo's proposed discovery exceeds the
 28 scope of the limited jurisdictional discovery permitted by the presiding judge" and that "most of

1 Lenovo’s proposed document requests are so broad that they appear to be directed to questions of
 2 general jurisdiction or the merits of the case.”); Dkt. 103 (J. DeMarchi’s June 23, 2020 Discovery
 3 Order) (once again “conclud[ing] that most of Lenovo’s disputed discovery requests exceed the
 4 permissible scope of jurisdictional discovery.”). Magistrate J. DeMarchi narrowed Lenovo U.S.’s
 5 requests, after which IPCom produced documents, answered interrogatories and produced Mr.
 6 Ross and Pio Suh, the Managing Direct of IPCom, for deposition.

7 While the jurisdictional discovery was underway, the Ninth Circuit issued the
 8 precedential *Qualcomm* decision, holding that an antitrust claim cannot be based upon a
 9 purported breach of FRAND commitments. *Qualcomm*, 969 F.3d 974, 982. Citing this new
 10 authority, IPCom then filed a second Motion to Dismiss based on *Qualcomm*. Dkt. No. 109. The
 11 Parties also filed supplemental briefs on the merits of the antitrust claim (Dkt. Nos. 142, 145), but
 12 the Court deferred decision pending resolution of the personal jurisdiction question (Dkt. No.
 13 149).

14 Following the completion of jurisdictional discovery, Plaintiffs sought leave and filed the
 15 Amended Complaint. The Amended Complaint adds bulk but contains nothing of substance on
 16 jurisdiction and stands pat on Plaintiffs’ antitrust theories. The only facts describing ties to this
 17 District are as follows:

- 18 • A handful of meetings in San Francisco with Motorola occurring on November 24, 2009,
 19 September 5, 2012, March 18, 2012, and September 20, 2013, which occurred prior to
 20 Lenovo’s acquisition of Motorola (¶¶ 32, 33, 40, 42, 45, 53);
- 21 • IPCom’s retention of Roger Ross, Director of Worldwide Licensing, in this District (San
 22 Carlos, California) to represent it in global licensing discussions with Plaintiffs and third-
 23 party Microsoft (¶¶ 59-63, 112);
- 24 • IPCom’s licensing negotiations with Apple and Microsoft, including several meetings
 25 with occurring in San Francisco and a 28 U.S.C. § 1782 application filed in this District
 26 by IPCom seeking discovery from Apple for use in foreign proceedings (¶¶ 16, 100-110,
 27 124).

28 The Amended Complaint also alleges various out-of-district meetings in the U.S. between

1 IPCom and Plaintiffs, as well as various communications exchanged between IPCom and
 2 Plaintiffs. *See e.g.*, Am. Compl. ¶¶ 31-58, 64-99. Plaintiffs were obviously aware of the
 3 meetings between them and IPCom during the prior briefing, and there is nothing new here. With
 4 respect to third party meetings, Plaintiffs do not say why such contacts would have any relevance
 5 to the question of specific jurisdiction in relation to the claims now before the Court.

6 **III. LEGAL STANDARD**

7 **A. Personal Jurisdiction**

8 “Determining whether jurisdiction exists over an out-of-state defendant involves two
 9 inquiries: whether a forum state’s long-arm statute permits service of process and whether
 10 assertion of personal jurisdiction violates due process.” *Autogenomics Inc. v. Oxford Gene Tech*
 11 *Ltd.*, 566 F.3d 1012, 1017 (Fed. Cir. 2009) (internal quotations omitted). Because California’s
 12 long-arm statute is coextensive with the limits of due process, the two inquiries collapse into a
 13 single inquiry: whether jurisdiction comports with federal due process. *Daimler AG v. Bauman*,
 14 571 U.S. 117, 125 (2014).

15 To satisfy due process where the defendant is not present in the forum, the defendant must
 16 have minimum contacts with the forum such that the assertion of jurisdiction “does not offend
 17 traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S.
 18 310, 316 (1945) (internal citations omitted). The defendant must have “purposefully availed itself
 19 of the privilege of conducting activities within the forum State or have purposefully directed its
 20 conduct into the forum State.” *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773,
 21 1786 (2017) (internal quotations omitted).

22 To determine whether a defendant has specific minimum contacts in the context of an
 23 antitrust claim, the inquiry is “whether the defendant has acted within any district of the United
 24 States or sufficiently caused foreseeable consequences in this country.” *Action Embroidery Corp.*
 25 *v. Atl. Embroidery Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (quoting *Sec. Investor Prot. Corp. v.*
 26 *Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985)). Although the Court may look to a defendant’s
 27 nationwide contacts for the purposes of specific jurisdiction over antitrust claims, the plaintiff
 28 must still show that (1) the defendant either “purposefully direct[s]” its activities or “purposefully

1 avails” itself of the benefits afforded by the forum’s laws; (2) the claim “arises out of or relates to
 2 the defendant’s forum-related activities; and (3) the exercise of jurisdiction “comport[s] with fair
 3 play and substantial justice, i.e., it [is] reasonable.” *In re Packaged Seafood Products Antitrust*
 4 *Litigation*, 338 F.Supp.3d 1118, 1148 (2018) (quoting *Williams v. Yamaha Motor Co.*, 851 F.3d
 5 1015, 1023 (9th Cir. 2017).

6 **B. Fed. R. Civ. P. 12(b)(6) – Failure to State a Claim**

7 Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper where there is either a
 8 “lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
 9 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To survive
 10 a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief
 11 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial
 12 plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer
 13 possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
 14 A plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.”
 15 *Twombly*, 550 U.S. at 555. For purposes of this analysis, “labels, conclusions, and a formulaic
 16 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. The Court
 17 is not required to “assume the truth of legal conclusions merely because they are cast in the form
 18 of factual allegations.” *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Nor must the
 19 court accept “allegations that are merely conclusory, unwarranted deductions of fact, or
 20 unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

21 **C. Fed. R. Civ. P. 12(b)(1) – Lack of Subject Matter Jurisdiction**

22 “Federal courts are courts of limited jurisdiction” and it is “presumed that a cause lies
 23 outside this limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
 24 (1994). “[T]he burden of establishing the contrary rests upon the party asserting jurisdiction.” *Id.*

25 “Whether an actual case or controversy exists so that a district court may entertain an
 26 action for a declaratory judgment of non-infringement and/or invalidity is governed by Federal
 27 Circuit law.” *MedImmune, Inc. v. Centocor, Inc.*, 409 F.3d 1376, 1378 (Fed. Cir. 2005),
 28 *overruled on other grounds*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 130-31 (2007);

1 28 U.S.C. § 2201(a). “[T]he question in each case is whether the facts alleged, under all the
 2 circumstances, show that there is a substantial controversy, between parties having adverse legal
 3 interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment.”
 4 *MedImmune*, 549 U.S. at 127. A party seeking declaratory judgment of non-infringement must
 5 show “(1) an affirmative act by the patentee relating to the enforcement of his patent rights and
 6 (2) meaningful preparation to conduct potentially infringing activity.” *Ass’n for Molecular*
 7 *Pathology v. United States PTO*, 689 F.3d 1303, 1318 (Fed. Cir. 2012) (internal citations
 8 omitted). Federal courts have “unique and substantial discretion in deciding whether to declare
 9 the rights of litigants.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). Such decisions are
 10 “reviewed for abuse of discretion.” *Id.* at 289-90.

11 Challenges to subject matter jurisdiction may be facial or factual. *White v. Lee*, 227 F.3d
 12 1214, 1242 (9th Cir. 2000). “In a facial attack, the challenger asserts that the allegations
 13 contained in a complaint are insufficient on their face to invoke federal jurisdiction” whereas “in
 14 a factual attack, the challenger disputes the truth of the allegations that, by themselves, would
 15 otherwise invoke federal jurisdiction.” *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039
 16 (9th Cir. 2004). The Federal Circuit’s law on facial and factual attacks does not materially differ
 17 from that of the Ninth Circuit. *Activevideo Networks, Inc. v. Trans Video Elecs. Ltd.*, 975 F.
 18 Supp. 2d 1083, 1085 n.1 (N.D. Cal. 2013) (citation omitted).

19 **IV. ARGUMENT**

20 **A. The Court Lacks Personal Jurisdiction Over IPCoM**

21 Plaintiffs have not argued general jurisdiction (*see* Dkt. No. 71, at 7), and accordingly,
 22 the 12(b)(2) motion turns on whether the Court has specific jurisdiction in relation to the pleaded
 23 claims. In patent cases, the inquiry turns on whether the patentee “purposefully directed such
 24 enforcement activities *at residents of the forum*, and the extent to which the declaratory judgment
 25 claim *arises* out of or relates to those activities.” *Avocent Huntsville Corp. v. Aten Int’l Co.*, 552
 26 F.3d 1324 (Fed. Cir. 2008) (emphasis added). Applying this standard, the Court previously
 27 concluded that Plaintiffs had failed to establish a prima facie case for personal jurisdiction. There
 28

1 is nothing in the Amended Complaint that changes the analysis.¹

2 **1. The Meetings in this District with Motorola are Insufficient to**
 3 **Establish Specific Jurisdiction in Relation to the Pleaded Claims**

4 The *only* affirmative conduct that Plaintiffs claim occurred in this District and relates to
 5 the asserted claims is that in 2012-13, Motorola and IPCo met in California to discuss a license.
 6 But the meetings took place more than six years before suit, and the limitations period on patent
 7 claims is six years. 35 U.S.C. § 286. These meetings are hardly sufficient to establish the
 8 existence of a ripe claim in 2019, much less today. Moreover, Motorola was based in Illinois, not
 9 California, and the happenstance of the meeting location is insufficient to confer jurisdiction.
 10 Lenovo China should not be permitted to use stale meetings with a company it purchased years
 11 ago to manufacture a pretext for bringing suit against IPCo now. Plaintiffs' failure to raise
 12 these meetings in the Original Complaint shows how tenuous the Motorola meetings are to the
 13 matters now in suit, and it would be odd indeed if Plaintiffs could excuse their tardiness in
 14 pleading these meetings on the need to "discover" meetings in which they participated.

15 **2. The IPCo/Lenovo China Negotiations Did Not Entail Contacts With**
 16 **the District**

17 The Amended Complaint also refers to IPCo's negotiations with Lenovo China, which
 18 were the subject of the prior motion practice. These discussions covered the terms of a global
 19 patent license between a Chinese and a German company. IPCo believed at all times that it was
 20 negotiating with the Chinese parent and only communicated with Lenovo China's United States
 21 subsidiaries when directed to do so by Lenovo China. *See* Dkt. No. 18, at 13; Suh Decl., ¶ 19;
 22 Ex. A, 105:10-106:20. The Court has already addressed the relevance of these meetings, and the

23
 24 ¹ The same is true with respect to Lenovo U.S.'s antitrust claim. Although the Court may look to
 25 nationwide contacts for purposes of that particular claim, the antitrust claim must still arise out of
 26 or relate to defendants' forum-related activities. *Schwarzenegger v. Fred Martin Motor Co.*, 374
 27 F.3d 797, 802 (9th Cir. 2004). For the reasons discussed below, none of IPCo's alleged
 28 contacts with the U.S. give rise to any antitrust claim.

1 Court’s conclusion that IPCom was not directing its negotiations at a resident of this District, or
2 for that matter any resident of the United States, stands. Order, at 18-19. As the Federal Circuit
3 has held, travel to a particular district to negotiate a license, without more, is insufficient to confer
4 jurisdiction. *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1024 (Fed. Cir. 2009)
5 (affirming dismissal for lack of jurisdiction when foreign declaratory judgment defendant traveled
6 to California to attempt to negotiate a license agreement); *Apple Inc. v. Zipit Wireless, Inc.*, No.
7 5:20-CV-04448-EJD, 2021 WL 533754, at *3 (N.D. Cal. Feb. 12, 2021) (dismissing complaint
8 for lack of personal jurisdiction even though declaratory judgment defendant traveled to the
9 forum several times to negotiate a license agreement); *Levita Magnetics Int’l Corp. v. Attractive
10 Surgical, LLC*, No. 19-CV-04605-JSW, 2020 WL 4580504, at *6 (N.D. Cal. Apr. 1, 2020)
11 (noting that “a defendant may not be subjected to personal jurisdiction if its only additional
12 activities in the forum state involve unsuccessful attempts to license the patent there”).

3. Roger Ross's Presence in this District Does Not Establish Jurisdiction

14 The Amended Complaint also includes various allegations surrounding IPCom’s retention
15 of Roger Ross; however, the Court’s December 12, 2019 Order already noted that “IPCom’s
16 retention of Mr. Ross in the United States is also not a purposeful direction of activity in this
17 form” because “[t]here is no indication that he was hired to conduct any activity in this forum.”
18 Order, at 20. The Amended Complaint does not allege otherwise. Indeed, as Plaintiffs admit,
19 Mr. Ross was the Director of Worldwide Licensing, and Mr. Ross was not hired to target
20 residents in California. Amended Compl., ¶ 59; Dkt. 38, at 12. Mr. Ross was hired for his
21 expertise, and his presence in this District and any activities or meetings occurring in California
22 was mere happenstance. *Id.*

23 While Lenovo provides new allegations regarding Mr. Ross’s communications with
24 potential licensees, the facts pleaded confirm that his duties related to IPCom’s *worldwide*
25 licensing efforts and were not specifically directed at this District. *See* Am. Compl. ¶ 59 (alleging
26 that Mr. Ross “had the title, ‘Director, Worldwide Licensing,’” which he used “when
27 communicating with prospective licensees on behalf of IPCom.”). Furthermore, the Amended
28 Complaint does not allege that Mr. Ross communicated with any entities residing within this

1 District. Am. Compl. ¶¶ 59-63. Microsoft is a Washington company. Apple is located in this
 2 District, but Mr. Ross did not have any contact with Apple.² Thus, even if the Court felt that
 3 discussions with third parties were somehow relevant to the claims asserted in the Amended
 4 Complaint, the third party contacts would be insufficient to justify a finding of specific
 5 jurisdiction over IPCom.

6 **4. Lenovo's Additional Remaining Allegations, Including Licensing
 7 Negotiations and Meetings with Apple and Microsoft in this District,
 8 Fail to Support a Finding of "Other Activities" for Personal
 Jurisdiction**

9 Lenovo has failed to allege "other activities" directed at the forum such that exercising
 10 jurisdiction would comport with the traditional notions of fair play and substantial justice.
 11 Examples of these "other activities" include initiating judicial or extra-judicial patent enforcement
 12 within the forum or entering into an exclusive license agreement or other undertaking which
 13 imposes enforcement obligations with a party residing or regularly doing business in the forum.
 14 *See Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1334 (Fed. Cir. 2008). Here, the
 15 Amended Complaint merely alleges that IPCom communicated with three other companies
 16 located in the U.S., only one of which (Apple), was located in this District. Those negotiations
 17 were not specific to the '844 and '144 patents but were instead directed to IPCom's worldwide
 18 patent portfolio.

19 The Amended Complaint also alleges various actions filed by IPCom, mostly in other
 20 districts. *See* Amended Compl., ¶¶ 29-30, 100-101, 123-134 (citing a declaratory judgment
 21 action HTC initiated against IPCom in the District of Columbia, a 28 U.S.C. § 1782 application
 22 against Apple in this District, and three actions in the Eastern District of Texas against several
 23 telecommunications carriers). These allegations are irrelevant to the analysis because they either

24
 25 ² The Amended Complaint does not allege that Roger Ross had any contact with Apple
 26 (headquartered in this district) and Roger Ross confirmed in his deposition that he did not
 27 communicate with Apple at all. *See* Ex. A, 73:17-19 ("Q. Did you have any dealings with Apple
 28 while at IPCom? A. No.").

1 involve different patents or were filed in other forums. Indeed, the Federal Circuit has repeatedly
 2 held that where a patentee challenges personal jurisdiction for a declaratory judgment action
 3 brought in a forum, the patentee's prior infringement suits brought in other forums and against
 4 other accused infringers on the same patent do not, normally, subject the patentee to personal
 5 jurisdiction in the forum. *Maxchief Investments Limited v. Wok & Pan, Ind., Inc.*, 909 F.3d 1134,
 6 1133-39 (Fed. Cir. 2018) (affirming dismissal of declaratory judgment complaint for lack of
 7 personal jurisdiction brought against a foreign U.S. patent owner where the patent owner had
 8 never enforced its patent in the forum); *Avocent Huntsville Corp. v. Aten Intern. Co., Ltd.*, 552
 9 F.3d 1324, 1338-39 (Fed. Cir. 2008) (rejecting argument that patentee's infringement actions
 10 filed in other forums, against other accused infringers, gave rise to specific personal jurisdiction
 11 in the pending forum); *Apple Inc. v. Zipit Wireless, Inc.*, No. 5:20-CV-04448-EJD, 2021 WL
 12 533754, at *4 (N.D. Cal. Feb. 12, 2021) (noting that "this Court declines to consider Zipit's
 13 litigations in other fora in answering the question of whether specific personal jurisdiction is
 14 established in California.").

15 IPCom has never filed a patent infringement case in this District, nor has it asserted the
 16 '844 or '144 patents in litigation in any other district. The application filed in this District
 17 pursuant to 28 U.S.C. §1782 was not a patent infringement action and did not even concern the
 18 '844 or '144 patents. It was also public knowledge during the original jurisdictional challenge,
 19 and Plaintiffs have no excuse for raising it now. More importantly, the proceeding was a petition
 20 to this Court seeking discovery from a resident corporation, Apple, for use in ongoing **foreign**
 21 patent litigations.³

22

23 ³ The Amended Complaint also conflates the term "enforce" and "assert" with the act of
 24 attempting to negotiate a license agreement. According to Lenovo, any communications
 25 surrounding a license negotiation is an enforcement or assertion of that patent. This is plainly
 26 incorrect. This Court previously recognized this distinction in its December 12, 2019 Order. *See*
 27 Order, at 20:16-24 (differentiating "asserted or threatened to assert" with the "mention of possible
 28 litigation in the United States" during licensing negotiations).

1 The remaining allegations in the Amended Complaint involve events occurring outside of
 2 this District (*i.e.*, IPCom’s meetings with Lenovo in North Carolina or litigation in Texas), and
 3 bear no relevance to the personal jurisdiction inquiry for Lenovo U.S.’s declaratory judgment
 4 claims. *Radio Sys. Corp. v. Accession, Inc.*, 638 F.3d 785, 792 (Fed. Cir. 2011) (“[E]nforcement
 5 activities taking place outside the forum state do not give rise to personal jurisdiction in the
 6 forum....”); *see also Shaffer v. Heitner*, 433 U.S. 186, 186 (1977) (specific personal jurisdiction
 7 involves examining “the relationship among the **defendant**, the **forum**, and the **litigation**”)
 8 (emphasis added). Nor do they bear any relationship to Lenovo U.S.’s antitrust claim or, as
 9 discussed below, provide a basis for such a claim. *Schwarzenegger*, 374 F.3d at 802.

10 **5. Subjecting IPCom to Jurisdiction in this District Would be Unfair,
 11 Unreasonable, and Violate the Traditional Notions of Fair Play and
 12 Substantial Justice**

13 Subjecting IPCom to jurisdiction in this District on this record would violate the
 14 traditional notions of fair play and substantial justice. The Supreme Court has repeatedly noted
 15 that it is “unreasonable and unfair” for a U.S. District Court to exercise jurisdiction over foreign
 16 litigants when the claim arose out of a foreign transaction. *Asahi Metal Industry Co. v. Superior
 17 Court of Cal., Solano Cty.*, 480 U.S. 102, 114 (1986). Despite Plaintiffs’ mischaracterizations,
 18 this dispute is between IPCom (a German company) and Lenovo China (a Hong Kong
 19 corporation). Moreover, as described above, the handful of contacts IPCom has had with this
 20 District, and even the United States as a whole for the purposes of the Court’s jurisdiction over
 Plaintiffs’ antitrust claim, do not rise to the level supporting the exercise of personal jurisdiction.

21 The Supreme Court has stated, “restrictions on personal jurisdiction are more than a
 22 guarantee of immunity from inconvenient or distant litigation” as they “are a consequence of
 23 territorial limitations on the power of the respective States.” *Bristol-Myers Squibb Co.*, 137 S. Ct.
 24 at 1780. Plaintiffs have not explained how a United States district court can make binding
 25 determinations regarding foreign patent infringement occurring in a foreign country and,
 26 implicating foreign patent law. The reason is that this Court cannot make those decisions. In
 27 *Stein Assocs. v. Heat & Control, Inc.*, 748 F.2d 653, 658 (Fed. Cir. 1984), the Federal Circuit
 28 considered this same question. The court confirmed that, “[o]nly a British court, applying British

1 law, can determine validity and infringement of British patents. British law being different from
 2 our own, and British and United States courts being independent of each other, resolution of the
 3 question of whether the United States patents are valid could have no binding effect on the British
 4 court's decision." *Id.* Further, Plaintiffs' antitrust allegations are predicated on an alleged breach
 5 of IPCom's FRAND commitments to be determined under French contract law. Thus, French
 6 law will control the breach of contract, FRAND declaratory judgment, and antitrust claims. *See,*
 7 *e.g., Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2012 WL 1672493, at *10 (N.D. Cal.
 8 May 14, 2012).

9 The Court must consider the "procedural and substantive interests of other nations in a
 10 state court's assertion of jurisdiction over an alien defendant." *Asahi*, 480 U.S. at 106. The
 11 Supreme Court has found that these interests are "best served by a careful inquiry into the
 12 reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find
 13 the serious burdens on an alien defendant outweighed by minimal interests on the part of the
 14 plaintiff or the foreign state." *Asahi*, 480 U.S. at 106. Plaintiffs have not articulated any such
 15 interests here, either their own or those of the forum, in deciding the instant matter.

16 **B. Lenovo U.S. Has Failed to State an Antitrust Claim**

17 Lenovo U.S.'s Amended Complaint attempts to dress up an alleged breach of a
 18 contractual FRAND commitment as an antitrust claim. The Ninth Circuit's decision in
 19 *Qualcomm*, however, closed the door on such claims, holding that an antitrust claim cannot be
 20 based on the alleged breach of a FRAND commitment. *See Qualcomm*, 969 F.3d at 997. Lenovo
 21 U.S. has argued that it is relying on a narrower "intentional deception" theory of liability under
 22 the Third Circuit's earlier decision in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir.
 23 2007). But even if an "intentional deception" theory survived in this Circuit after *Qualcomm*, it
 24 requires a plaintiff to plead facts demonstrating that (1) the defendant intentionally deceived a
 25 standard setting organization ("SSO"), and (2) such deception caused antitrust injury—*i.e.*, that it
 26 harmed competition in a properly-defined antitrust market. *See Rambus Inc. v. FTC*, 522 F.3d
 27 456 (D.C. Cir. 2008). Lenovo U.S.'s Amended Complaint fails to do either.

28

1 First, the Amended Complaint fails to plead anticompetitive conduct, the foundation of
 2 any antitrust claim. In *Qualcomm*, the Ninth Circuit held that the alleged breach of a FRAND
 3 obligations—the only conduct that Lenovo U.S. alleges here—does not trigger antitrust liability.
 4 Lenovo U.S. argues that it is relying on exception based on the “intentional deception” of an SSO,
 5 but even if that were a valid exception, Lenovo U.S. has failed to allege facts showing such
 6 deception here. The Amended Complaint’s sole allegation supporting the claimed deception is
 7 that IPCom, or its predecessors, must have intentionally deceived ETSI because, in Lenovo U.S.’s
 8 view, the terms that IPCom later offered were not FRAND. That is not enough to state a claim
 9 for intentional deception. If it were, *Qualcomm* would be meaningless.

10 Second, Lenovo U.S. has also failed to satisfy the separate requirements to plausibly plead
 11 that the alleged deception caused antitrust injury – that it harmed competition in a properly
 12 defined antitrust market. In the recent *Intel* decision, the court emphasized that, in the context of
 13 markets for patented technology, would-be antitrust plaintiffs must do more than assert general
 14 allegations of competitive harm in vaguely-defined, overly-broad technology markets. *See Intel*
 15 *Corp. v. Fortress Inv. Grp. LLC*, No. 19-7651, 2021 WL 51727 (N.D. Cal. Jan. 6, 2021) (Chen,
 16 J.). Lenovo U.S.’s failure to plead these critical elements of a monopolization offense likewise
 17 doom its antitrust claim.

18 1. **Lenovo U.S. Fails to Plead Anticompetitive Conduct Required for its**
 19 **Section 2 Monopolization Claim.**

20 To plausibly plead its monopolization claim under Section 2 of the Sherman Act, Lenovo
 21 U.S. must allege facts showing that IPCom engaged in “anticompetitive conduct”—that is, an
 22 “anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of
 23 attempting to monopolize the relevant market.” *Qualcomm*, 969 F.3d at 990 (quoting *Allied*
 24 *Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010)).
 25 Here, Lenovo U.S.’s monopolization claim fails because the Ninth Circuit has expressly held that
 26 the mere breach of a contractual FRAND commitment does not trigger liability under Section 2.
 27 *Qualcomm*, 969 F.3d at 997 (citing the “general rule that breaches of [standard setting
 28 organization] commitments do not give rise to antitrust liability”). In doing so, the Ninth Circuit

1 specifically rejected the FTC’s position “that Qualcomm’s alleged breach of its SSO
 2 commitments to license its patents on FRAND terms, even assuming there was a breach,
 3 amounted to anticompetitive conduct in violation of § 2.” *Id.*

4 In response, Lenovo U.S. has argued that its antitrust claim fits a narrow exception based
 5 on the Third Circuit’s earlier decision in *Broadcom*, in which the court allowed antitrust claims
 6 based on the alleged intentional deception of an SSO to proceed. *Qualcomm*, however, has made
 7 clear that there is no such exception in the Ninth Circuit, at least for claims based solely on the
 8 alleged breach of a FRAND commitment. The Ninth Circuit emphasized the “persuasive policy
 9 arguments of several academics and practitioners with significant experience in SSOs, FRAND,
 10 and antitrust enforcement, who have expressed caution about using the antitrust laws to remedy
 11 what are essentially contractual disputes between private parties engaged in the pursuit of
 12 technological innovation.” *See Qualcomm*, 969 F.3d at 997. Thus, to the extent that courts prior
 13 to *Qualcomm* permitted *Broadcom*-style claims to survive, the Ninth Circuit requires factual
 14 allegations beyond the alleged breach of a FRAND commitment to state such a claim.⁴

15 Indeed, carefully read, even *Broadcom* itself demands more than an alleged breach of a
 16 FRAND commitment in order for an antitrust claim to survive. *Broadcom* involved, and the court
 17 in that case explicitly referenced, affirmatively deceptive conduct going beyond the mere
 18 allegation that the defendant later failed to make a FRAND offer to the plaintiff. *See Broadcom*

19

20 ⁴ Lenovo has, for example, cited to numerous cases decided prior to *Qualcomm* in support of its
 21 antitrust claim. *See, e.g., Wi-LAN Inc. v. LG Elecs., Inc.*, 382 F. Supp. 3d 1012, 1023 (S.D. Cal.
 22 2019); *u-blox AG v. Interdigital, Inc.*, No. 19-001, 2019 WL 1574322, at *3-4 (S.D. Cal. Apr. 11,
 23 2019); *FunaiElec. Co., Ltd. v. LSI Corp.*, No. 16-1210, 2017 WL 1133513, at *5 (N.D. Cal. Mar.
 24 27, 2017). To the extent these cases conflict with *Qualcomm*, the Ninth Circuit’s decision in that
 25 case controls. Moreover, many of these cases (like *Broadcom* itself) involved alleged facts
 26 beyond the mere breach of a FRAND commitment and, therefore, are easily distinguishable on
 27 that basis as well. *See e.g., FunaiElec.* 2017 WL 1133513, at *5 (discussing sham patent
 28 litigation allegations which were “part of a larger anticompetitive scheme”).

1 *Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310–11 (3d Cir. 2007) (citing as examples a defendant
 2 “fail[ing] to disclose that it owned a patent for a key design feature of the standard” and “even
 3 certif[y]ing] to the [SSO] that the proposed standard did not infringe” its intellectual property
 4 rights); *see also Rambus*, 522 F.3d at 464 (recounting FTC finding that the defendant engaged in
 5 “misrepresentations, omissions, and other practices that deceived [the SSO] about the nature and
 6 scope of its patent interests”); *TCL Commc’ns Tech. Holdings, Ltd. v. Telefonaktienbolaget LM*
 7 *Ericsson*, No. 14-0341, 2016 WL 7049263, at *5 (C.D. Cal. Aug. 9, 2016) (discussing
 8 *Broadcom*’s focus on affirmatively deceptive acts).

9 Lenovo U.S.’s Amended Complaint contains no such factual allegations, let alone facts
 10 approximating the affirmatively deceptive conduct cited in cases like *Broadcom* or *Rambus*.
 11 Rather, Lenovo U.S. asks the Court to infer that whatever FRAND commitments IPCom, or
 12 others, made were necessarily deceptive because, in Lenovo U.S.’s view, IPCom later offered
 13 license terms that were not FRAND. *See* Am. Compl. ¶ 181. But if merely alleging a breach of a
 14 FRAND commitment were enough to show intentional deception, it would render meaningless
 15 *Qualcomm*’s holding that breaching a FRAND commitment is not an antitrust violation. Even
 16 before *Qualcomm*, at least one court in this Circuit rejected “this kind of bootstrapping,” holding
 17 that because “the *Broadcom* court made the ‘intentionally false promise’ and subsequent ‘breach
 18 of that promise’ two separate elements, it is clear that there needs to be some other conduct by
 19 [defendant] than mere breach of its FRAND obligations.” *TCL Commc’ns*, 2016 WL 7049263, at
 20 *6. Similarly, courts have routinely held that plaintiffs cannot use such bootstrapping to convert a
 21 garden-variety breach of contract into fraud, which is essentially what Lenovo U.S. seeks to do.
 22 *See, e.g., Guebara v. Allstate Ins. Co.*, No. 96-1683, 1997 WL 33322250, at *7 (S.D. Cal. June 4,
 23 1997) (granting summary judgment on fraud claim because plaintiff was “merely ‘bootstrapping’
 24 a fraud claim onto the breach of contract claim by alleging that [the defendant] never intended to
 25 uphold its end of the deal when it entered into the policy.”).

26 Lenovo U.S.’s bare bones Amended Complaint fails to plead a plausible antitrust claim. It
 27 is not enough to write “FRAND” and “SSO” in a complaint and declare that is sufficient to
 28 support an antitrust claim. Lenovo U.S.’s cavalier approach to pleading is insufficient to meet its

1 pleading burden under *Iqbal* and *Twombly*. Lenovo U.S.’s antitrust claims fail for these reasons
 2 alone.

3 **2. Lenovo U.S. Has Failed to Plead Facts Showing That IPCo’s
 4 Conduct Caused Antitrust Injury or Injury to Lenovo U.S..**

5 Lenovo U.S.’s antitrust claim also fails because it has not pleaded facts demonstrating that
 6 it suffered antitrust injury, a necessary element of any antitrust claim. To have standing to assert
 7 an antitrust claim, a plaintiff must plead facts demonstrating that the challenged conduct caused
 8 not just any injury to itself, but antitrust injury—that is, injury “that flows from that which makes
 9 defendants’ acts unlawful,” *i.e.*, a harm to competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat,*
 10 *Inc.*, 429 U.S. 477, 489 (1977); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051,
 11 1056 (9th Cir. 1999). Lenovo U.S. has failed to plead facts showing any harm to competition or
 12 even to itself.

14 A general allegation of deception is not enough to show harm to competition. “Deceptive
 15 conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a
 16 monopolization claim” and “[c]ases that recognize deception as exclusionary hinge, therefore, on
 17 whether the conduct impaired rivals in a manner tending to bring about or protect a defendant’s
 18 monopoly power.” *Rambus*, 522 F.3d at 464; *see also id.* at 466-67 (“[I]f [the SSO] in the world
 19 that would have existed but for [defendant’s] deception, would have standardized the very same
 20 technologies, [defendant’s] alleged deception cannot be said to have had an effect on competition
 21 in violation of the antitrust laws.”). Therefore, for its monopolization claim to survive, Lenovo
 22 U.S. must plead facts showing that IPCo’s conduct excluded rivals, impaired their ability to
 23 compete, or otherwise reduced competition. *See Qualcomm*, 969 F.3d at 990 (“[T]o be
 24 condemned as exclusionary, a monopolist’s act must have an anticompetitive effect—that is, it
 25 must harm the competitive process and thereby harm consumers.” (internal quotations omitted)).

1 The Amended Complaint, however, contains no such allegations. For example, Lenovo
 2 U.S. does not, and cannot, allege that IPCom's conduct prevented anyone from competing in the
 3 alleged relevant market, or even impaired anyone's ability to do so. Nor does it plead concrete
 4 factual allegations identifying any competing technology excluded as a result of the alleged
 5 deception, or that such alternative technology would have been available on a more competitive
 6 basis. Lenovo U.S.'s failure to allege such facts further confirms that this is a breach of contract
 7 case masquerading as an antitrust case. But this failure is fatal and requires dismissal of the
 8 antitrust claim. *See Somers v. Apple, Inc.*, 729 F.3d 953, 966 (9th Cir. 2013) (noting that
 9 "insistence on specificity of facts is warranted before permitting a case to proceed into costly and
 10 protracted discovery in an antitrust case . . .").

12 Indeed, Lenovo U.S. has failed to plead facts showing that IPCom's alleged conduct has
 13 caused it any injury at all, let alone an injury flowing from a harm to competition. To the extent
 14 that Lenovo U.S.'s real complaint is that IPCom asked for too high a royalty rate, it has not
 15 pleaded any injury from this request or that it has paid any unreasonable royalty. To the contrary,
 16 Lenovo U.S. continues to sell products in the United States without interference and without
 17 paying any royalty at all. The only two patents specified in the Amended Complaint (U.S. Patent
 18 Nos. 6,307,844 and 6,920,124) have expired. IPCom has not filed a claim for infringement of
 19 these patents and is barred by their expiration from seeking injunctive relief. IPCom's alleged
 20 actions, therefore, have caused no harm to Lenovo U.S. itself or to competition. Lenovo U.S.'s
 21 antitrust claims should be dismissed for this reason as well.

24 **3. Lenovo U.S. Fails to Plead a Properly Defined Antitrust Market**

25 Lenovo U.S.'s monopolization claim should also be dismissed because it fails to allege
 26 facts properly defining a relevant antitrust market. In a case involving standard essential patent
 27 licensing, general allegations of harm to competition in vaguely-defined and overbroad

1 technology markets are insufficient to survive a motion to dismiss. *See Intel Corp. v. Fortress*
 2 *Inv. Grp. LLC*, 511 F. Supp. 3d 1006 (N.D. Cal. 2021). A plaintiff must allege facts supporting
 3 plausible market definitions and identify what competition was harmed in those markets. *Id.* at
 4 1019-20. As *Intel* explains, adequately pleading a relevant antitrust market is critical in an
 5 antitrust case because “without a definition of the market, there is no way to measure [the
 6 defendant’s] ability to lessen or destroy competition.” *See id.* (quoting *Qualcomm*, 969 F.3d at
 7 992).

8 The *Intel* court found that many of the product markets alleged in that case were
 9 impermissibly overbroad, including alleged markets for “local cache management,” “shared
 10 memory access,” and “health monitoring.” *Id.* at *11–12. Here, Lenovo U.S.’s product market
 11 allegations provide even less detail than those found deficient in *Intel*. Lenovo U.S.’s alleged
 12 “technology markets” are not defined by reference to any product or technology at all. *See Am.*
 13 *Compl.* ¶ 183 (relevant market defined as “the technologies covered by IPCom’s declared
 14 essential patents . . . that IPCom has asserted against Plaintiffs for purposes of products that
 15 implement the 2G, 3G, and 4G standards, together with all other alternative technologies to the
 16 IPCom technologies that could have been incorporated into the standards”). As in *Intel*, Lenovo
 17 U.S.’s deficient market definition allegations leave no way for the Court to even begin to assess
 18 basic questions of market power or competitive effects. This is grounds on its own to dismiss
 19 Lenovo U.S.’s antitrust claim. *See Coronavirus Reporter v. Apple Inc.*, No. 21-05567, 2021 WL
 20 5936910, at *7 (N.D. Cal. Nov. 30, 2021) (dismissing antitrust claims in part because plaintiff
 21 failed to “define the boundaries of or differences between” its alleged product markets, rendering
 22 it impossible to “discern what is included and what is not”).

23 **C. This Court Lacks Subject Matter Jurisdiction over Counts IV and V Due to
 24 the Lack of Case or Controversy**

25 Lenovo U.S. has failed to establish declaratory judgment jurisdiction over either patent
 26 non-infringement claim because it has not plead “an affirmative act by the patentee relating to the
 27 enforcement of his patent rights” *Molecular Pathology*, 689 F.3d at 1318. An “affirmative
 28 act” requires more than “a communication from a patent owner to another party, merely

1 identifying its patent and the other's product line" *Hewlett-Packard Co. v. Acceleron LLC*,
 2 587 F.3d 1358, 1362 (Fed. Cir. 2009). "How much more is required is determined on case-by-
 3 case analysis." *3M Co. v. Avery Dennison Corp.*, 673 F.3d 1372, 1379 (Fed. Cir. 2012). Courts in
 4 this District review thirteen factors to determine whether the patentee has committed an
 5 "affirmative act." *Activevideo Networks, Inc. v. Trans Video Elecs. Ltd.*, 975 F. Supp. 2d 1083,
 6 1087-88 (N.D. Cal. 2013). Those factors are:

- 7 1. the strength of any threatening language in communications between the
 parties;
- 8 2. the depth and extent of infringement analysis conducted by the patent
 holder;
- 9 3. whether the patent holder imposed a deadline to respond;
- 10 4. any prior litigation between the parties;
- 11 5. the patent holder's history of enforcing the patent at issue;
- 12 6. whether the patent holder's threats have induced the alleged infringer to
 change its behavior;
- 13 7. the number of times the patent holder has contacted the alleged infringer;
- 14 8. whether the patent holder is simply a holding company with no source
 of income other than enforcing patent rights;
- 15 9. whether the patentee refused to give assurance it will not enforce its patent;
- 16 10. whether the patent holder has identified a specific patent and specific
 infringing products;
- 17 11. the extent of the patent holder's familiarity with the product prior to suit;
- 18 12. the length of time that transpired after the patent holder asserted
 infringement; and
- 19 13. whether communications initiated by the declaratory judgment plaintiff
 have the appearance of an attempt to create a controversy in anticipation
 of filing suit.

20 *Id.* Here, an analysis of these factors weigh against jurisdiction.

21 Factors 1, 2, 3, and 10 weigh against the finding of a case or controversy between the
 22 parties. The negotiations between IPCom and Lenovo China carried on over a number of years and
 23 involved numerous patents. There was no "threat" to either plaintiff here as that term is properly
 24 understood. While Plaintiffs refer to the element-by-element patent charts provided by IPCom, the
 25 charts did not identify any of Lenovo U.S.'s products. Instead, the claims were mapped against a
 26 third-party standard. *See Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 905 (Fed. Cir. 2014).
 27 The overall picture is here is one of consensual negotiations, not aggressive threats of litigation.
 28 The fact that IPCom has not served an infringement claim on the Plaintiffs to this day only

1 underscores the point.

2 Similarly, factors 4 and 5 weigh against jurisdiction because IPCoM has never filed any
 3 action against Lenovo U.S. and has never initiated an affirmative suit for patent infringement in
 4 the United States for the '124 and '844 patents. Factor 7 also weighs against jurisdiction because
 5 the parties have been in intermittent contact since at least 2017 without any prior lawsuit
 6 materializing. And, with respect to Factor 9, IPCoM has never “refused to give assurance it will
 7 not enforce” the '124 and '844 patents. *Activevideo Networks*, 975 F. Supp. 2d at 1087. To the
 8 contrary, IPCoM offered a negotiation framework by which it would “refrain from filing a claim
 9 for injunctive relief before any court or tribunal in the EEA for infringement of any of its
 10 SEPs...” Dkt. No. 17-13 at 5, ¶ 7. Lenovo China, the ultimate parent of the parties here,
 11 declined that offer and Lenovo U.S. has never requested a standstill agreement, in the United
 12 States or anywhere else. Dkt. No. 36-1 (“Lenovo is under no legal or other obligations to execute
 13 such an Agreement in order to discuss IPCoM’s patents and licensing proposals.”). Factor 12 also
 14 weighs against jurisdiction, as the '124 and '844 patents have expired for over two years, and
 15 IPCoM still has not asserted a claim for patent infringement over either patent.

16 Lastly, Factor 13 weighs against jurisdiction since the “communications initiated by
 17 [Lenovo U.S.] have the appearance of an attempt to create a controversy in anticipation of filing
 18 suit.” *Activevideo Networks*, 975 F. Supp. 2d at 1088. As noted in the parties’ prior briefings and
 19 the Court’s Order, IPCoM was originally negotiating with Lenovo China and only contacted
 20 Lenovo U.S. when instructed to do so by Lenovo China. Thus, Lenovo U.S. manufactured the
 21 instant controversy. As a result, under these circumstances, the Court should find that it lacks
 22 subject matter jurisdiction over these claims.

23 **D. The Court Should Decline to Hear Lenovo U.S.’s Declaratory Judgment
 24 Claims Under Pursuant to the Declaratory Judgment Act**

25 The Court should independently exercise its discretion to dismiss Counts II, IV and V. As
 26 evidenced by immediate post-filing communications, Lenovo U.S. filed the instant suit for
 27 negotiation leverage, noting that “[i]n the event that we are unable to agree upon FRAND terms
 28 consistent with the ETSI IPR Policy, we have asked the court to determine the FRAND licensing

1 terms and rates for the party.” Dkt. No. 17-10. This activity, as recognized by the Federal
 2 Circuit, is nothing more than a “tactical measure filed in order to improve [the declaratory
 3 judgment plaintiffs] posture in ongoing negotiations—not a purpose that the Declaratory
 4 Judgment Act was designed to serve.” *EMC Corp. v. Norand Corp.*, 89 F.3d 807, 815 (Fed. Cir.
 5 1996).

6 In *EMC*, the parties “were involved in negotiations over the sale or licensing of Norand’s
 7 patents up to the time the complaint was filed.” *Id.* at 815. EMC filed suit for declaratory
 8 judgment during negotiations. *Id.* As noted by the Federal Circuit:

9 The day after the complaint was filed, EMC’s senior intellectual property
 10 counsel called Norand’s outside patent counsel and explained that the
 11 declaratory judgment complaint had been filed as ‘merely a defensive
 12 step’ and that EMC ‘would like to continue to discuss with you all the
 13 options hopefully in a more meaningful manner over the near term. By
 14 way of explaining why the complaint was filed, EMC’s counsel added
 15 that EMC’s management decided to file suit because ‘they just thought it
 16 was in their interest to protect themselves first and continue discussions.’”

17 *Id.* Similarly, Lenovo China rejected IPCom’s FRAND offer but, in order to avoid litigation
 18 against its UK subsidiaries, it had Lenovo U.S. file this anticipatory suit. Dkt. No. 17-10.
 19 Lenovo China continued to attempt to negotiate a global license, in particular requesting
 20 information primarily regarding European patents that are not related to either of the ’124 or ’844
 21 patents. Dkt. No. 17-10 (demanding a “license to IPCom’s patent portfolio”); Dkt. No. 109-3, at
 22 2-3 (responding to Lenovo China’s requests for information primarily regarding European
 23 patents); Dkt. No. 109-5, at 1 (requesting the application of damages methodologies from
 24 *Unwired Planet v. Huawei*, [2017] EWHC 711 (Pat), *affirmed* [2020] UKSC 37). And once it
 25 became clear that IPCom would not be intimidated into surrendering its foreign patent rights,
 26 Lenovo U.S. filed an improper antisuit injunction. Dkt. No. 58-1 at 16 (as noted by the French
 27 tribunal, “[t]he prohibition imposed on IPCom to initiate or continue proceedings before the
 28 French judge infringes the fundamental rights granted to it by the higher standards, in terms of
 property, those guaranteed to a party to a lawsuit and those relating to intellectual property.”).

29 Moreover, Count II seeks an advisory opinion only giving Lenovo China, the real party in
 30 interest, a tactical advantage in seeking an eventual global settlement. Lenovo China, through its

1 United States subsidiary, seeks three declarations: “(1) a determination that IPCom has not
 2 offered Plaintiffs a license to its alleged 2G, 3G, and 4G SEPs on FRAND terms and conditions;
 3 (2) a determination of what constitutes FRAND terms and conditions for a license to IPCom’s
 4 alleged 2G, 3G, and 4G SEPs, with those terms and conditions being imposed on the parties; and
 5 (3) a determination that the FRAND terms and conditions must be consistent with well-
 6 established apportionment principles under federal patent law (*i.e.*, the smallest salable patent
 7 practicing unit rule).” Am. Compl. at ¶ 173.

8 The requests for declaratory relief are duplicative of Lenovo U.S.’s breach of contract
 9 claim and “dismissal of the claim for declaratory relief related to breach of contract is proper.”
 10 *Reyes v. Nationstar Mortg. LLC*, No. 15-CV-01109-LHK, 2015 WL 4554377, at *8 (N.D. Cal.
 11 July 28, 2015). Moreover, “[d]eclaratory relief should be denied when it will neither serve a
 12 useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings
 13 and afford relief from the uncertainty and controversy faced by the parties.” *United States v.*
 14 *Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (internal citations omitted).

15 In addition, the second and third requests seek an application of U.S. law to foreign
 16 patents, provides incomplete relief to either party, and would likely be unenforceable. *See*
 17 *InterDigital Commc’ns, Inc. v. ZTE Corp.*, No. 1:13-CV-00009-RGA, 2014 WL 2206218, at *3
 18 (D. Del. May 28, 2014). In fact, Lenovo U.S. seeks relief for its “worldwide affiliates” who, in
 19 turn, otherwise refuse to submit to the jurisdiction of this Court. Dkt. No. 38 at 6:16-7:11. These
 20 determinations would only serve to “alter the current negotiation power between the parties,” and
 21 not any legitimate purpose of the Declaratory Judgment Act. *Interdigital*, 2014 WL 2206218, at
 22 *3. Essentially, Lenovo China seeks an advisory opinion, through Lenovo U.S., from this Court
 23 as a starting point by which IPCom and Lenovo China will establish a global patent license.

24 When considering the totality of circumstances, Lenovo U.S. should not be allowed to
 25 force IPCom, a foreign entity, to participate in a proceeding over its worldwide patent rights in
 26 this District. As explained above, Lenovo U.S.’s tactic of starting a declaratory judgment to
 27 obtain negotiation leverage should not be rewarded. To do so will condone the use of the courts
 28 as tools for contract negotiations, undermine the considerations of comity and relations between

1 sovereigns, ignore the purpose of the Declaratory Judgment Act, and allow Lenovo China to seek
2 the benefits and protection of U.S. laws without subjecting itself to personal jurisdiction here.

3 **V. CONCLUSION**

4 For the reasons stated above, IPCoM respectfully requests that the Court dismiss all counts
5 of Lenovo U.S.'s Amended Complaint.

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1 Dated: December 29, 2021

Respectfully submitted,

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